

No. 78 - 403

Supreme Court, U. S.

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MICHAEL RUDAK, JR., CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1978

**WILLIAM J. SCOTT, IN HIS OFFICIAL CAPACITY AS  
ATTORNEY GENERAL OF THE STATE OF ILLINOIS,**

*Petitioner,*

vs.

**UNITED STATES OF AMERICA,**

*Respondent.*

On Petition For A Writ Of Certiorari To The United  
States Court Of Appeals For The Seventh Circuit

**PETITIONER'S REPLY MEMORANDUM**

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Petitioner respectfully suggests that the Memorandum of the United States misapprehends both the constitutional questions presented by the Petition for Certiorari and the factual matters underlying those questions.

Petitioner does *not* contend that "the principles of comity and federalism, as expressed in the Tenth Amendment, immunize the public records of the State of Illinois from production to a federal grand jury". (Memorandum in Opposition, p. 3) Rather, Petitioner contends that principles of federalism and comity render constitutionally impermissible an exercise of federal power in an instance where that power is *wholly unnecessary* to accomplish the purpose for which it is exercised.

The distinction drawn is critical.

The United States supports its view of this case by an incorrect reading of relevant State law. The Illinois State Records Act does *not* condition access to public documents upon "the discretion of the State Attorney General". (Memorandum in Opposition, p. 4 and *Ill. Rev. Stat.*, 1977, ch. 116, par. 43.6) Furthermore, the position of the United States discreetly ignores subpoenas issued against a State agency other than that of the Attorney General.

The position of the United States is sustainable only if this Court accepts the view enunciated by the 7th Circuit that because the Attorney General is under investigation there arises a "justifiable doubt of full compliance" (Opinion, 7th Circuit, p. 8) with any request for production of State records by and through the vehicle of the State Records Act. This view, which presumes breach of public trust and public duty by a person charged with absolutely no wrongdoing, is contrary to the law as declared by this Court and by the various circuits. (See cases cited in certiorari petition, p. 16-17) This is particularly true in the present case since the issuance of subpoenas has not been confined to the office of the Attorney General.

The present case is not one in which the Attorney General or the State of Illinois seek to foreclose information to a Grand Jury, or in which the use of subpoenas is challenged where their use is necessary to obtain State papers not otherwise available. The core of this case centers upon the use of subpoenas even though it was freely admitted by the United States Attorney that the use of the subpoena process was *unnecessary* to obtain the materials sought. This is clearly illustrated by the following colloquy in the United States District Court:

"The Court [addressing the District Attorney]: The problem is that you don't call for them [the state records] and you insist on subpoenaing them.

Mr. Sullivan [the District Attorney]: Well, that's right, but if they are available without a subpoena doesn't it follow that they are available with a subpoena? . . ." (Tr., 3/22/78, p. 35)

Further, the case is presented to this Court in the face of an admission on the part of the United States Attorney, specifically noted by the 7th Circuit, that the use of subpoenas to obtain State papers is continuing and will be used in the future.\* (Opinion, 7th Circuit, p. 3)

Use of the State Records Act in no way impedes the function of the federal Grand Jury. The constitutional question presented does not relate to the Grand Jury's right to evidence. This case raises a fundamental constitutional issue—the limits imposed upon the exercise of federal power against a Sovereign State in an instance where a use of that power is unnecessary for the accomplishment of any federal purpose.

\* In this regard Petitioner notes that the cases regarding mootness as cited by the United States are wholly inapposite and are contrary to the law as declared by this Court.

It is upon this point that the Petition for Certiorari ought to be allowed.

Respectfully submitted,

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